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No. 82-589

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1982

TRAVENOL LABORATORIES, INC.
and BAXTER LABORATORIES, INC.,
*Petitioners,*

v.

WILLIE MAE PAYNE, *et al.*,
individually and on behalf of
all others similarly situated,
*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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November 17, 1982

PANDICK PRESS, WASHINGTON—1001 N. OAK STREET, ARLINGTON, VA 22209—(703) 522-5555

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Petitioners ("Travenol") ask this Court to vacate the decision below because, contrary to *Pullman-Standard v. Swint*, 456 U.S. ____, 50 U.S.L.W. 4425 (U.S. April 27, 1982), the Court of Appeals rejected the District Court's finding that Travenol was "well intentioned" and substituted its own new finding, inferred from subsidiary facts, that Travenol intended to discriminate.

Respondents ("plaintiffs") oppose the petition on the ground that the District Court made a finding of subjective discrimination in hiring. This argument proceeds on the

premise that there need not be a finding of an intent to discriminate, and thus leaves unaddressed Travenol's argument that the Court of Appeals impermissibly inferred intent.

Travenol has never disputed that the District Court entered a finding of subjective discrimination. It was Travenol's challenge to this finding that required the Court of Appeals to examine first whether the statistics proved a disparity, and second, whether disputed hiring procedures were a pretext for an intent to discriminate.

The Court of Appeals rejected Travenol's contention that the statistics did not establish a disparity because they included the impact of an educational requirement. But the court agreed that the elimination of the education requirement issue had transformed the case from disparate impact into disparate treatment, and that proof of intent was "crucial." (App. 68a.) The court went on to infer intent from "subsidiary" findings of the District Court and thus to reject a contrary District Court finding that Travenol was "well intentioned."

Plaintiffs' argument that the District Court's finding of subjective discrimination is sufficient is nothing more than an argument that intent is unnecessary. This argument flies in the face of the Court of Appeals' determination that "the case must now be analyzed as a disparate treatment case," and that intent to discriminate is essential. (App. 68a.) Plaintiffs' position is not surprising; they argued below that Travenol was required to validate its hiring process under *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), a disparate *impact* case. Now they ask this Court to treat disparate treatment as disparate impact. (Plaintiffs' brief, pp. 13-15.) But disparate impact theory clearly is inapplicable and intent is a crucial element of disparate treatment. The Court of Appeals' inference of intent and rejection of the District Court's contrary finding were impermissible under *Swint*.

## CONCLUSION

For the reasons set forth in Travenol's petition and above, the petition for a writ of certiorari should be granted, the judgment below vacated, and the matter remanded for reconsideration. Should the Court regard summary action as inappropriate, the writ should be granted.

Respectfully submitted,

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